No. 89-337-CSX
Status: DECIDED

Title: National Mines Corporation, Petitioner
v.
Michael E. Caryl, Tax Commissioner of the State of West Virginia

Docketed:
August 28, 1989

Court: Supreme Court of Appeals of West Virginia

Counsel for petitioner: Robinson,E. Glenn

Counsel for respondent: Shank,John E.

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1989	G	Petition for writ of certiorari filed.
2	Sep 27 1989		Brief of respondent Michael E. Caryl, Tax Commissioner in opposition filed.
3	Oct 4 1989		DISTRIBUTED. October 27, 1989
4	Jun 1 1990		REDISTRIBUTED. June 7, 1990
6	Jun 8 1990		REDISTRIBUTED. June 14, 1990
8	Jun 15 1990		REDISTRIBUTED. June 21, 1990
10	Jun 22 1990		REDISTRIBUTED. June 27, 1990
11	Jun 28 1990		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

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89-337

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL MINES CORPORATION,

Petitioner,

v.

MICHAEL E. CARYL, as Tax Commissioner of the State of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the State of West Virginia validly enforce and collect a tax which has been held to be unconstitutional by this Court?

2. Does the West Virginia tax, measured by gross receipts received from the business of selling tangible personal property at wholesale, impose an unconstitutional burden on interstate commerce, inasmuch as Kentucky has previously collected a coal severance tax measured by the same gross receipts?

3. Is the West Virginia gross receipts tax unconstitutional as sought to be applied in this case because (a) it is not fairly related to the benefits provided to the taxpayer by the State and (b) it is not fairly apportioned to the taxpayer's local activities?

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TABLE OF AUTHORITIES

Official and Unofficial Reports of Opinions Delivered Below

In the Matter of the Petition of National Mines Corporation, Administrative Decision, Docket #81-097 B, File No. 55 035 0627 001, West Virginia State Tax Department (April 16, 1984).

National Mines Corp. v. *Caryl, as Tax Commissioner*, No. 84-C-AP-165 (Cir. Court of Kanawha County, W.Va., May 2, 1988).

National Mines Corp. v. *Caryl, as Tax Commissioner* (May 31, 1989) (order of Supreme Court of Appeals of West Virginia refusing appeal).

JURISDICTIONAL STATEMENT

On May 31, 1989, the Supreme Court of Appeals of West Virginia entered an order denying National Mines Corporation's petition for appeal from an order entered by the Circuit Court of Kanawha County, West Virginia on May 2, 1988. The Circuit Court upheld and permitted the State of West Virginia to enforce and collect an assessment of State tax under a statute which this Court had already held to be unconstitutional.[1] Moreover, the Circuit Court determined, in the face of evidence to the contrary, that the assessment did not impose unconstitutional multiple burdens of taxation and did not otherwise violate the Commerce Clause of the United States Constitution.

Accordingly, this Court has jurisdiction to review the aforesaid judgment by writ of certiorari pursuant to 28 U.S.C. §1257, which provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

National Mines Corporation (hereinafter "National") asserts the right to be free of impermissible burdens on interstate commerce, which right is conferred by the Commerce Clause, and its right to be free from enforcement of a tax sought to be collected under an admittedly unconstitutional statute, which right is conferred by the Supremacy Clause.

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[1] *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct.2620, 81 L.Ed.2d 540 (1984).

Constitutional Provisions, Treaties, Statutes Ordinances and Regulations Involved

The following constitutional provisions, treaties, statutes, ordinances, and regulations are involved in this case.

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be unfiorm throughout the United States.

U.S.Const., Art. I, § 8, cl.3.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.Const., Art. VI, cl.2.

> There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-a to two-m [§§ 11-13-2a to 11-13-2m], inclusive, of this article and the application of the surtax rate against gross income as set forth in section two-k [§ 11-13-2k].
>
> * * *
>
> A person exercising any privilege taxable under section two-a, two-b, two-1 or two-m [§§ 11-13-2a, 11-13-2b, 11-13-21 or 11-13-2m] of this article and engaging in the business of selling his natural resources, manufactured products or electricity at retail in this state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section two-c [§ 11-13-2c] of this article for the privilege

> of engaging in the business of selling such natural resources, manufactured products or electricity at retail in this state. But any person exercising any privilege taxable under section two-a, two-b, two-1 or two-m [§§ 11-13-2a, 11-13-2b, 11-13-21 or 11-13-2m] of this article and engaging in the business of selling his natural resources, manufactured products or electricity to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in section two-c [§ 11-13-2c] of this article.

W.Va. Code, § 11-13-2 (1983).

> Upon every person engaging or continuing within this State in the business of selling any tangible property whatsoever, real or personal, including the sale of food, and the services incident to the sale of food in hotels, restaurants, cafeterias, confectioneries, and other public eating houses, except sales by any person engaging or continuing in the business of horticulture, argiculture or grazing, or of selling stocks, bonds or other evidences of indebtedness, there is likewise hereby levied, and shall be collected, a tax equivalent to fifty-five one hundredths of one percent of the gross income of the business, except that in the business of selling at wholesale the tax shall be equal to twenty-seven one hundredths of one percent of the gross income of the business.

W.Va. Code, § 11-13-2c (1983).

> For the privilege of severing or processing coal, in addition to all other taxes imposed by law, a tax is hereby levied on every taxpayer engaged in severing and/or processing coal within this Commonwealth at the rate of four and one-half percent (4.5%) of the gross value of all coal severed and/or processed during the reporting period; except that the minimum tax for a reporting period shall be an amount determined by applying a rate of fifty cents (50¢) per ton to the total

number of tons severed during the reporting period. The minimum tax shall not apply to a taxpayer who only processes coal.

Ky. Rev. Stat. § 143.020 (1978).

Statement of the Case

On December 22, 1980, the State Tax Department of West Virginia issued an assessment of business and occupation tax against National. The tax sought to be imposed was a tax on the activity of conducting wholesale sales in West Virginia. According to the assessment, National owes that tax pursuant to the provisions of *W.Va. Code* §§ 11-13-2 and 11-13-2c. The assessment covers the period January 1, 1975 through December 31, 1979 (hereinafter, "the audit period").[2]

National timely filed a Petition for Reassessment with the State Tax Department on February 23, 1981. In the Petition for Reassessment, National asserted that the tax assessed violated the Due Process Clause and the Commerce Clause of the United States Constitution. Petition for Reassessment, at pages 2-3. An administrative hearing on the Petition for Reassessment was held on May 23, 1983, and a full record of the hearing was made and is before the Court. At that hearing, National's counsel argued that the assessment violated rights conferred on National by the United States Constitution, in that the tax resulted in multiple burdens of taxation, the tax discriminated against interstate commerce, and the measure of the tax was not reasonably related to the services provided by the State of West Virginia. Transcript, pages 6-7, 14-17. National subsequently filed a brief with the Office of Hearings and Appeals, the administrative tribunal vested with authority to hear the proceeding, setting forth its position at length. Petitioner's Memorandum in Support of Petition for Reassessment, at pages 3-12.

[2] There is a second assessment against National involving the same issues raised in this appeal now pending before the Office of Hearings and Appeals. That assessment covers the period 1980 through 1985 and involves $314,613 of additional tax and interest.

On April 16, 1984, then State Tax Commissioner Herschel H. Rose, III issued an Administrative Decision upholding the assessment. In that decision, National was said to be liable for taxes in the amount of $475,345.02 and interest in the amount of $16,017.71, for a total claimed liability of $491,362.73. Assessed penalties were waived by the Commissioner. In the Administrative Decision, the Commissioner also stated that "The existence of a Kentucky severance tax which utilizes a portion of gross receipts as a measure of the tax, therefore, does not impose a multiple burden in a 'constitutional sense,' which invalidates the imposition of the West Virginia tax on wholesale sales within this State." Administrative Decision, p. 12. The Commissioner further determined that the tax did not discriminate against interstate commerce and that the measure of the tax was reasonably related to the benefits conferred by the State. Administrative Decision, pp. 13 and 14.

On June 15, 1984, National timely filed its appeal from the Administrative Decision to the Circuit Court of Kanawha County, West Virginia. In its Petition for Appeal, National asserted that the Commissioner had erred in concluding that the assessment did not violate the Commerce Clause or the Due Process Clause of the United States Constitution. Petition for Appeal by National Mines Corporation from an Administrative Decision of the Tax Commissioner of the State of West Virginia, page 3. Almost simultaneously with National's filing of its petition for appeal, this Court issued its opinion in *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984), holding unconstitutional the West Virginia tax sought to be collected from National. National's Circuit Court action was held in abeyance for a period of time while the case of *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W.Va. 1986), went to this Court for review. Thereafter progress in National's case resumed. National filed briefs with the Circuit Court arguing that the State of West Virginia cannot validly enforce and collect a tax which had already been held to be unconstitutional by this Court in

Armco. The Supremacy Clause of the United States Constitution was not raised nor considered by the Supreme Court of Appeals of West Virginia or by this Court in the *Ashland Oil* case.[3]

On May 6, 1988, the Circuit Court of Kanawha County nevertheless entered an order upholding the assessment. In its Final Order, the Circuit Court stated in pertinent part as follows:

> In *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.E.2d 540 (1984), the United States Supreme Court determined that the West Virginia business and occupation tax violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as applied to taxpayers manufacturing products outside West Virginia and selling them at wholesale in West Virginia. The tax was unconstitutional as applied to such taxpayers because West Virginia manufacturers, who paid a tax on their manufacturing activity, were exempt from the tax on their wholesale sales activity.
>
> National Mines does not fall precisely within the holding of *Armco*. It produces natural resources (as opposed to manufacturing products) outside West Virginia and sells them in West Virginia. Under the statutory scheme, it is subject to the business and occupation tax on its wholesale sales activity. West Virginia producers are subject to tax on their production activity, but are exempt from tax on their wholesale sales activity. This statutory scheme parallels the scheme

[3] Nor did Ashland press the factual distinction between "refund" cases and "enforcement" cases. In a "refund" case, the taxpayer seeks to recover from the State funds that the State has collected under authority of a statute at the time of collection presumed to be constitutional. In such a case, the State may have some legitimate reliance interest on retaining those funds, which it may already have spent. In an "enforcement" case, the taxpayer seeks to protect himself from unlawful State action in the form of collection of an unconstitutional tax. In such a case, the State's reliance interest is "cut off" by the decision declaring the tax unconstitutional, and the state cannot have spent funds which it has not yet received.

ruled upon in Armco. There can be little doubt that the statutory scheme applied to National Mines violates the Commerce Clause in the same manner as did the statutory scheme in *Armco*.

In recent cases where the United States Supreme Court has ruled that state tax statutes violate the Commerce Clause, it has declined to address the issue of what constitutes an appropriate remedy in the first instance. Because federal constitutional issues may be intertwined with or obviated by state law, state courts should first address the issue of refund claims. *National Can Corp* v. *Washington Dept. of Revenue*, 483 U.S. , 107 S.Ct. , 97 L.Ed.2d 199 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

In *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W.Va. 1986), the West Virginia Supreme Court has addressed the issue of the appropriate remedy in a situation involving a taxpayer like Armco. It determined that the *Armco* decision was to be applied prospectively. The *Ashland* decision applied to both taxpayers who paid the tax and filed claims for refund and taxpayers who had been assessed the tax and appealed their assessments. The tax commissioner relies on the decision in *Ashland* in his attempt to enforce the assessment against National Mines.

Because the *Ashland* decision allows the tax commissioner to assess and collect tax under a statutory scheme that is unconstitutional, National Mines argues that the holding violates the Supremacy Clause, U.S. Const., art.VI,cl.2. This Court recognizes that it is unfair to allow tax to be collected under a taxing scheme that is so clearly unconstitutional. However, the Court is required to follow the decision of the West Virginia Supreme Court unless and until the West Virginia Supreme Court overrules itself, or its decision is overturned by the United States Supreme Court.

Final Order, pp. 2-3.

The Court below (the Circuit Court) also addressed the taxpayer's arguments under the Commerce Clause, stating that the State of West Virginia was permitted to tax the unapportioned gross receipts from the activity of selling within West Virginia and further stating that the State has given the taxpayer something for which the State may ask a return. Final Order, pp. 3 and 4.

On January 30, 1989, National timely filed its Petition for Appeal in the Supreme Court of Appeals of West Virginia. In its Petition, National assigned the following errors, *inter alia*:

> (2) The Circuit Court erred in concluding that enforcement of the subject assessment is not precluded by the Supremacy Clause of the United States.
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> * * *
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> (4) The Circuit Court erred in concluding that the assessment does not subject National Mines to impermissible multiple burdens of taxation.
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> * * *
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> (6) The Circuit Court erred in concluding that the West Virginia tax assessed was fairly apportioned to National Mines' in-State activities.
>
> (7) The Circuit Court erred in concluding that the West Virginia tax assessed is reasonably related to the benefits conferred upon National Mines by the State of West Virginia.

Petition for Appeal, pp. 4 and 5. On March 7, 1989, National presented oral argument in support of its Petition. On May 31, 1989, the Supreme Court of Appeals of West Virginia refused to consider National's Petition for Appeal.

National is a corporation principally engaged in the production and sale of coal.[4] Its corporate headquarters is located in Lexington, Kentucky. The company engages in coal mining operations in Pennsylvania, Kentucky and West Virginia. During the audit period, National returned and paid $337,522.00 in business and occupation tax to the State of West Virginia with respect to all of its coal mining activities in West Virginia.

National also mined coal through its Isabella and Beaver Creek Divisions in Pennsylvania and Kentucky, respectively. Some of National's coal mined in Pennsylvania and Kentucky was sold to West Virginia purchasers in interstate commerce. It is only these interstate sales to West Virginia customers from Kentucky or Pennsylvania that are at issue in this case.

With respect to and because of its coal mining operations in Kentucky, National paid to Kentucky during the audit period (a) a corporate net income tax, (b) a property tax and (c) a coal severance tax. The last of these, Kentucky's severance tax, is measured by "gross receipts" derived from the sales of coal mined in that state, less certain adjustments.

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[4] In compliance with Rule 28.1 of the Rules of the Supreme Court of the United States, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of National Mines Corporation: National Steel Corporation is the parent corporation of National Mines Corporation. National Mines Corporation's only subsidiaries are wholly owned. National Mines Corporation's affiliates are American Steel Corporation, D.W. Pipeline Company, Delray Connecting Railroad Company, Granite City Steel Company, Granite Intake Corporation, Granite Office Building Corporation, Great Lakes Steel Corporation, The Hanna Furnace Corporation, Hanna Ore Mining Company, Liberty Pipe and Tube, Inc., Mathies Coal Company, Midwest Steel Corporation, Natcoal, Inc., National Acquisition Corporation, National Caster Acquisition Corporation, National Caster Operating Corporation, National Casting Corporation, National Coal Mining Company, National Materials Procurement Corporation, National Steel Corporation (NY), National Pellet Co., Natland Corporation, NS Land Company, NSL, Inc., Presque Isle Corporation, Procoil Corporation, Puritan Mining Company, and The Teal Lake Iron Mining Company.

These adjustments remove from "gross receipts" the cost of processing and transporting the coal.

During the audit period, the severance tax rate imposed upon National by Kentucky was 4% until July 1, 1976; thereafter, it was 4½%. The record is unequivocal that during the audit period, National sold some of the coal mined and taxed in Kentucky into West Virginia. The record is also clear that Kentucky imposed its tax on the very same "gross receipts" received by National as West Virginia is now undertaking to tax again in this case. In fact, National paid taxes in excess of $3,000,000 to Kentucky because of coal it mined in that state and sold into West Virginia.

On a year-by-year basis during the audit period, a comparison can be made from the record of the effect West Virginia's attempt to impose a business and occupation tax has upon the gross receipts received by National for Kentucky coal sold into West Virginia. The record shows that in 1975, National paid $244,790.00 to the Commonwealth of Kentucky on these gross receipts; West Virginia would impose an additional $18,380.24 of tax by reason of the same coal sales. For the year 1976 National paid to Kentucky $667,274.00 measured by its West Virginia coal sales and West Virginia is now attempting to collect an additional $45,920.76 of tax measured by these same gross receipts. In 1977, National paid a Kentucky tax of $530,799.60 measured by its West Virginia coal sales; West Virginia claims the right to collect an additional $36,539.87 in tax measured by the same sales. For the year 1978, the Kentucky tax measured by National's West Virginia coal sales was in the amount of $787,569; West Virginia has assessed an additional $50,223.93 of tax on these sales. For the year 1979, Kentucky paid a tax of $930,618.00 measured by National's West Virginia sales; West Virginia would, if permitted, collect an additional $57,099.69 of tax on the very same gross receipts.

During the audit period and continuing until July 1, 1987,[5] companies which mined coal in West Virginia were exempt entirely from business and occupation tax on the subsequent sale of the West Virginia mined coal under the provisions of Chapter 11, Article 13, Section 2 of the West Virginia Code. In pertinent part, that provision of the West Virginia Business and Occupation Tax Statute reads as follows:

> . . . But any person exercising any privilege taxable under sections two-a [production of natural resources], two-b [manufacturing], two-l [coal severance tax] or two-m [producing electric power] of this article and engaging in the business of selling his natural resources, manufactured products or electricity to producers of natural resources, manufacturers, wholesalers, jobers, retailers or commercial consumers for use or consumption in the purchaser's business shall not be required to pay the tax imposed in two-c [wholesaling] of this article.

W.Va. Code, §11-13-2 (1983). However, there was no exemption available to producers, such as National, who mined coal outside of West Virginia and made subsequent wholesale sales of that coal in interstate commerce to West Virginia purchasers.

Argument

I. THE STATE OF WEST VIRGINIA CANNOT VALIDLY ENFORCE AND COLLECT FROM NATIONAL A TAX WHICH HAS BEEN HELD TO BE UNCONSTITUTIONAL BY THIS COURT

The Circuit Court of Kanawha County correctly concluded that the statute upon which the assessment against National is based violates the Commerce Clause of the United States Constitution, in that it subjects National to a tax from which it would have been exempt had it produced,

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[5] The subject tax was repealed by legislative enactment effective as of July 1, 1987.

within West Virginia, the natural resources it sold in West Virginia. In the words of Judge Canady, "There can be little doubt that the statutory scheme applied to National Mines violates the Commerce Clause in the same manner as did the statutory scheme in [*Armco, Inc.* v. *Hardesty,* 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984)]." (May 2, 1988 order of Circuit Court of Kanawha County, West Virginia, at page 2.)

The Circuit Court acknowledged that the Tax Commissioner's attempt to enforce the assessment of an unconstitutional tax is inherently inappropriate. Again, in Judge Canady's words, "This Court recognizes that it is a [sic] unfair to allow tax to be collected under a taxing scheme that is so clearly unconstitutional." (May 2, 1988 order of Circuit Court of Kanawha County, West Virginia, at page 3.)

Nevertheless, the Circuit Court refused to strike down the assessment. The Circuit Court concluded that the opinion of the Supreme Court of Appeals of West Virginia in *Ashland Oil, Inc.* v. *Rose,* 350 S.E.2d 531 (W.Va. 1986), bound the Circuit Court to uphold and enforce the assessment of an unconstitutional tax in this case.

National argued on appeal that the *Ashland Oil* case does not state a principle of law that can be mechanistically applied to determine an appropriate remedy in another taxpayer's decision. In *Ashland Oil* the Supreme Court of Appeals of West Virginia simply determined that the appropriate remedy was to afford Ashland Oil only prospective relief from the unconstitutional tax statute. The Court reached its conclusion by applying to the facts of the *Ashland Oil* case the tests set forth in *Bradley* v. *Appalachian Power Co.,* 163 W.Va. 322, 256 S.E.2d 879 (1979), a tort case. At most, the *Bradley* tests are to be applied on a case-by-case basis, and the Circuit Court erred when it found that *Ashland Oil* precluded it from reaching a correct result in this case.

The Circuit Court acknowledged that *Ashland Oil* would not be determinative of this case if that decision were to be

overturned by this Court. While it is unnecessary to overrule *Ashland Oil* to afford National relief in this case, there is ample reason to overrule that decision. The reason National is entitled to relief from West Virginia's attempt to collect an unconstitutional tax in this case, and the grounds for overruling *Ashland Oil,* are found in the Supremacy Clause of the United States Constitution. The Supremacy Clause provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be *the supreme Law of the Land; and the Judge in every state shall be bound thereby,* any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
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> U.S. CONST., art.VI, cl.2 (underscoring supplied)

The plain and well understood meaning of the Supremacy Clause is that the Constitution is itself the paramount law of our federal system. *See, Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, 72 L.Ed. 857, 48 S.Ct. 451 (1928), *overruled on other grounds Alabama* v. *King & Boozer,* 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43 (1941); *Hawke* v. *Smith,* 253 U.S. 221, 64 L.Ed. 871, 40 S.Ct. 495 (1920); *Buchanan* v. *Warley,* 245 U.S. 60, 62 L.Ed. 149, 38 S.Ct. 16 (1917); *House* v. *Mayes,* 219 U.S. 270, 55 L.Ed. 213, 31 S.Ct. 234 (1911); *Southern Ry.* v. *Greene,* 216 U.S. 400, 54 L.Ed. 536, 30 S.Ct. 287 (1910); *Harbert* v. *County Court of Harrison County, West Virginia,* 129 W.Va. 54, 39 S.E.2d 177, 184 (1946). The supremacy of the Constitution is unequivocal and absolute. *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 80 L.Ed. 1160, 56 S.Ct. 855 (1936); *Ableman* v. *Booth,* 62 U.S. 506, 16 L.Ed. 169 (1859).

In discussing the superiority of the United States Constitution, Chief Justice Marshall in the celebrated decision in

Marbury v. *Madison*, 5 U.S. (1 Cranch.) 137, 2 L.Ed. 60 (1803), reasoned that:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
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> *Marbury*, 5 U.S. at 175, 2 L.Ed. at 73.

As the supreme law, the federal Constitution is binding upon all federal and state officers, departments and courts. *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958); *Poindexter* v. *Greenhow*, 114 U.S. 270, 29 L.Ed. 185, 55 S.Ct. 903 (1885); *Cook* v. *Moffat*, 46 U.S. 295, 12 L.Ed., 159 (1847); *Cary* v. *Curtis*, 44 U.S. 236, 11 L.Ed. 576 (1839). State courts are thus charged with the same obligation as federal courts in enforcing the United States Constitution and the law made manifest through it. *Smith* v. *O'Grady*, 312 U.S. 329, 85 L.Ed. 859, 61 S.Ct. 572 (1941); *Mooney* v. *Holohan*, 294 U.S. 103, 79 L.Ed. 791, 5 S.Ct. 340 (1935).

In *Cook* v. *Moffat*, 46 U.S. 295, 12 L.Ed. 159 (1847), this Court held that state courts are bound by its decisions declaring state laws to be unconstitutional. The fundamental law of the land was held to be that:

> The Constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States. When this court has declared state legislation to be in conflict with the Constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision.
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> *Cook*, 46 U.S. at 307, 12 L.Ed. at 165.

The Circuit Court failed to observe that the Supreme Court of Appeals of West Virginia has itself recently reiterated that "an unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1879), quoted in *Comm. on Legal Ethics of the West Virginia State Bar* v. *Triplett*, 378 S.E.2d 82 (W.Va. 1988). In support of that principle, the Supreme Court of Appeals cited *Norton* v. *Shelby County*, 118 U.S. 425 (1885) and 16 Am. Jur. 2d Constitutional Law § 256 (1979). In a footnote, the Supreme Court of Appeals stated:

> Generally we do not believe it is sound practice to cite Am. Jur. because the treatise often states the majority and minority positions on a given issue with equal force. However, we deviate from our general rule here because with regard to the effect of unconstitutional laws, it appears that the weights of authority for *the proposition quoted is so overwhelming that there is no minority position.*

16 Am.Jur.2d § 256, in relevant part, reads:

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, *an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed.* Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. No repeal of such an enactment is necessary.
>
> Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.

> No one is bound to obey an unconstitutional law and no courts are bound to enforce it. Persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid.

Comm. on Legal Ethics of the West Virginia State Bar v. *Triplett*, 378 S.E.2d 82 (W.Va. 1988) (emphasis supplied and footnotes omitted).

A state statute in conflict with the United States Constitution is void and shall have no effect. *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 68 L.Ed.2d 558, 559 (1981). An unconstitutional state statute, being void, is therefore unenforceable at either the state or federal level. *Taylor* v. *Thomas*, 89 U.S. 479, 22 L.Ed. 789 (1875); *see The Chinese Exclusion Case*, 130 U.S. 581, 32 L.Ed. 1068 9 S.Ct. 623 (1889); *Worcester* v. *Georgia*, 31 U.S. 515, 8 L.Ed. 483 (1832); *Cohens* v. *Virginia*, 19 U.S. 264, 5 L.Ed. 257 (1821); *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. (2 Dall.) 304, 1 L.Ed. 391 (1795).

Contemporary constitutional law cases are both adamant and matter-of-fact in their application of this principle. For example, in *Hillsborough County, Florida* v. *Automated Medical Labs, Inc.*, 471 U.S. 707, 85 L.Ed.2d 714, 105 S.Ct. 2371 (1985), this Court declared: "It is a familiar and well established principle that the Supremacy Clause, U.S. CONST., art. VI cl. 2, *invalidates* state laws that 'interfere with, or are contrary to' federal law." 47 U.S. 707 at 713, 85 L.Ed.2d 714 at 721 (emphasis added); *See Maryland* v. *Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). Yet, in the face of these controlling authorities, the Order from which this review is sought on its face purports to enforce a void and unenforceable statute.

II. THE ASSESSMENT SUBJECTS NATIONAL TO MULTIPLE BURDENS OF TAXATION IN VIOLATION OF THE COMMERCE CLAUSE.

In making its record in this case, National did exactly what the Supreme Court of Appeals of West Virginia had instructed a taxpayer to do in order to prove a multiple

burdens claim. According to the West Virginia Court, "A taxpayer making a claim of multiple or cumulative taxation bears the burden of proving that it will be required to pay taxes on the same gross receipts by two or more states." *Virginia Foods of Bluefield, Virginia, Inc.* v. *Dailey*, 161 W.Va. 94, 239 S.E.2d 770, 771 (1977) (syllabus point 3). That burden has been borne by National.

The record in this case clearly shows that the assessment of West Virginia's business and occupation tax involves an attempt by West Virginia to collect from National approximately $206,000 on the very same gross receipts which Kentucky has taxed in the amount of $3,158,000. This fact is undisputed. Nevertheless, the Circuit Court concluded that National had failed to prove its multiple burdens claim.

The Circuit Court obviously misunderstood National's position. It confused an argument concerning the apportionment of taxes with a separate argument concerning multiple burdens of taxation. National argues both (1) that the West Virginia business and occupation tax was not fairly apportioned (see below) and (2) that National has been subjected to multiple burdens of taxation. While the concepts are related, they are distinct and different. A taxpayer can be subjected to multiple burdens of taxation under two fairly apportioned tax statutes. This Court has recognized this proposition by noting that "Many states provide tax credits that alleviate or eliminate the potential multiple taxation that results when two or more sovereignties have jurisdiction to tax parts of the same chain of commercial events." *Tyler Pipe Industries* v. *Dept. of Revenue*, 483 U.S. 232, at , 97 L.Ed.2d 199, at 212, 107 S.Ct. , at (1987)(fn. 13).

The confusion of the Court below appears to have come in part from a misinterpretation of this Court's opinion in *Tyler Pipe*. That case stands only for the proposition that there is no apportionment problem where the tax is imposed on an activity which must be presumed (in the absence of evidence to the contrary) to occur wholly within the State. However, that proposition does not preclude the possibility

that a taxpayer in a given case will have been subjected to multiple burdens of taxation. As the Supreme Court of Appeals of West Virginia itself pointed out in *Virginia Foods, supra*, a taxpayer can meet its burden of demonstrating multiple burdens by showing that it has been taxed on the same gross receipts by more than one jurisdiction.

The Court below noted that taxation of an in-state activity is permissible even though the value of the transaction is in part attributable to a *separate* activity occurring outside this State. It also observed that a state may impose a tax on an activity that occurs inside the State measured by the gross receipts from that activity, even though those gross receipts may include value added by an activity that occurs outside the State. But the Court wholly failed to recognize that unlike most cases, the record in this case *does* clearly show that the activity that is the subject of the tax imposed by West Virginia in fact took place in part within West Virginia and in part outside West Virginia and that the measure of both Kentucky's tax and West Virginia's tax are the same gross receipts. This being the case, the Court below should never have adopted the fiction that the taxed activity occurred wholly within West Virginia. It was a clear error which demands review and correction for the West Virginia Court to conclude that the tax on National's activity was fairly apportioned. In point of fact, West Virginia's tax on wholesaling contains no method for apportioning the tax where, as here, part of the activity taxed occurred in West Virginia and part occurred in Kentucky.

III. THE ASSESSMENT VIOLATES THE COMMERCE CLAUSE IN THAT THE TAX IS NOT REASONABLY RELATED TO THE BENEFITS CONFERRED BY THE STATE.

The Order of the Circuit Court concluded, wrongly, that the West Virginia tax assessed is reasonably related to the benefits that were conferred upon National by the State of West Virginia. It properly noted that the State of West Virginia has given National something (e.g., a civilized society and state courts by resort to which National Mines can

protect its interests within the State of West Virginia) for which the State may legitimately ask a return. What the Court failed to take into account, however, was the undisputed evidence that National has already paid for these benefits. National paid to the State of West Virginia $337,522 in business and occupation taxes with regard to its West Virginia activities during the audit period. This case is therefore distinguishable from those cases in which a foreign corporation seeks to argue that it should totally escape taxation by the State even though the residents of the State provide it with benefits. Just as all divisions of the corporate taxpayer are considered in determining whether there is nexus present to support taxation, all divisions of the corporate taxpayer must be considered in determining whether the taxpayer has contributed to the State taxes reasonably related to the benefits which have been conferred upon it by the State. This record unquestionably demonstrates that National has already paid fully for those benefits relied upon by the Court below.

Prayer for Relief

WHEREFORE, Petitioner, National Mines Corporation, prays that a writ of certiorari be issued out of this Honorable Court to the Supreme Court of Appeals of West Virginia commanding the Clerk thereof to certify and return to this Court the proceedings in this case, and for such other relief as may be just.

NATIONAL MINES CORPORATION
By Counsel

E. Glenn Robinson

David K. Higgins
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600 United Center
P.O. Box 1791
Charleston, West Virginia
(304) 344-5800

APPENDIX

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petition of

NATIONAL MINES CORPORATION
P.O. Box 12022
Lexington, Kentucky 40571

BUSINESS TAX DIVISION

DOCKET #81-097 B

File No. 55 035 0627 001

PRESIDING HEARING EXAMINER:	Robert P. Rodak
PETITIONER REPRESENTED BY:	David K. Higgins, Attorney at Law David L. Kyger, Attorney at Law Herb Steele, Asst. Tax Mgr., National Steel Corporation Les Downing, Mgr. General Acct., National Mines Corporation
BUSINESS TAX DIVISION REPRESENTED BY:	Mary C. Holbert, Staff Attorney Martha S. Price, Accountant Michael O. Moore, Field Supervisor
DATE, TIME AND PLACE OF HEARING:	May 23, 1983, 10:00 A.M. State Tax Department Office of Hearings and Appeals 1217 Quarrier Street Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

An assessment for business and occupation tax was issued against National Mines Corporation (herein also referred to as the Petitioner) on December 12, 1980, by Jon H. Snyder, Director of the Business Tax Division, pursuant to the lawful authorization of Herschel H. Rose III, State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 13 of the West Virginia Code. This assessment was for the period January 1, 1975 through December 31, 1979 for tax of $475,345.02, interest of $16,017.71, penalty of $103,488.84, for a total assessed liability of $594,851.57. It was served on the Petitioner on December 26, 1980.

The Petitioner filed a petition for reassessment by delivering it to the State Tax Department on February 23, 1981. The petition having been timely filed, the matter was regularly set for hearing, and the Petitioner was served with notice of the hearing.

Robert P. Rodak, a hearing examiner designated to hear the matter, determined that all proper notices and documents required by law had been timely filed and call the matter on to be heard at 10:00 A.M., EST, on the 23rd day of May, 1983, in the State Tax Department at Charleston, West Virginia.

FACTS

Petitioner is a corporation principally engaged in the production and sale of coal. Its corporate headquarters is located in Lexington, Kentucky. Petitioner operates mines located in Pennsylvania, Kentucky and West Virginia.

During the audit period, Petitioner engaged in substantial mining in West Virginia and paid a total of $3,337,522.00 in business and occupation tax with respect to its mining operations in West Virginia.

Petitioner operated one deep mine in West Virginia which employed approximately 350 to 400 persons. Additionally, Petitioner had 12 to 18 contract miners working on approximately eighteen to nineteen thousand acres in West Virginia.

Petitioner also sells a substantial amount of coal which it mines at out-of-state locations to West Virginia Customers. The vast majority of its sales into West Virginia were sold under contract to Weirton Steel Company.

The audit findings included unreported income attributable to (1) engineering fees, (2) federal reclamation fees, (3) production of coal from contract miners and (4) wholesale sales of coal produced in Pennsylvania and Kentucky and sold to West Virginia customers.

Petitioner has conceded the taxability of the gross income of all the above items except West Virginia's wholesale sales of coal produced in Kentucky.

With respect to its mining operation in Kentucky, Petitioner pays the Commonwealth of Kentucky a corporate net income tax, a property tax, and a coal severance tax. The coal severance tax is measured by the gross receipts from the sales of the coal less certain adjustments. The adjustments are for (1) coal processing costs, (2) transportation costs, and (3) brokered coal. During the audit period, the coal severance tax rate was four percent prior to July 1, 1976, and four and one-half percent thereafter.

For each year of the audit period, Petitioner has paid the Kentucky coal severance tax on coal which Petitioner ultimately sold to West Virginia customers.

ISSUES AND DETERMINATIONS

The issue presented is whether the imposition of the business and occupation tax upon Petitioner's sales of Kentucky mined coal to West Virginia customers violates the due process clause and the commerce clause of the United States Constitution.

Pursuant to Article I, Section 8, Clause 3 of the United States Constitution Congress has the exclusive power to regulate commerce among the states. Any tax imposed by a state which interferes with this exclusive power is unconstitutional.

In *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), the Supreme Court set forth the criteria for compliance with the commerce clause.

The Court indicated that a state tax violates the commerce clause if (1) the activity taxed does not have a sufficient nexus with the state to justify a tax, (2) the tax is not fairly apportioned to the taxpayer's local activities, (3) the tax discriminates against interstate commerce, or (4) the tax is not fairly related to benefits provided by the state to the taxpayer. These criteria have been labeled the "four prongs" of *Complete Auto Transit.* In order to pass constitutional muster, the state tax must satisfy each of these criteria.

In the present case, Petitioner has conceded, because of its West Virginia mining operations, that there is a substantial nexus between the taxpayer and the State. Petitioner alleges, however, that the other three criteria raised by *Complete Auto Transit* are violated by the West Virginia business and occupation tax on wholesale sales of coal mined in Kentucky and sold in West Virginia.

The "second prong" of *Complete Auto Transit* requires that the state tax be fairly apportioned to the taxpayer's local activities, in order to avoid subjecting a taxpayer engaged in interstate commerce to an impermissible multiple tax burden. Petitioner claims that the instant assessment subjects it to an impermissible multiple burden, and that therefore the tax is not fairly apportioned.

The coal mined in Kentucky and sold to West Virginia customers, the sale of which is being subjected to business and occupation tax, is also subjected to a coal severance tax by Kentucky. The severance tax is levied on the gross value of coal at the time it is severed. *Clay County* v. *Leslie County* 531 S.W.2d 524 (Ky. App. 1975). The measure of the Kentucky severance tax is the sales price less certain deductions for transportation and processing costs. West Virginia, in this matter, imposed a business and occupation tax upon privilege of engaging within this State the business of selling tangible property measured by the gross income derived from such sales. W. Va. Code § 11-13-2(c).

Petitioner argues that since the measure of both the Kentucky severance tax and the West Virginia business and occupation tax utilizes the *same gross receipts* in computing its tax, that the imposition of the West Virginia business and occupation tax constitutes an impermissible multiple burden.

Petitioner relies on *Virginia Foods of Bluefield, Va., Inc.* v. *Dailey,* 239 S.E.2d 770 (W. Va. 1977) where it was stated, "A taxpayer making a claim of multiple or cumulative taxation bears the burden of proving that it will be required to pay taxes on the same gross receipts by two or more states." *Id.* at 771 (Syllabus point 3). Petitioner contends that, where others have failed, it has clearly shown through demonstrative evidence an impermissible multiple burden necessary to invalidate the taxing of a certain portion of its sales into this state. Such a position cannot be sustained.

Initially it must be pointed out that Kentucky's severance tax is imposed upon the gross value of all coal mined by Petitioner in Kentucky. The West Virginia business and occupation tax is imposed solely on the sales of such coal into West Virginia. Accordingly, the *identical* gross receipts of Petitioner are not being taxed by both states. Although it is true that the measure of the West Virginia business and occupation tax, i.e. sales price, has also been used in the measure of Kentucky's severance tax, this alone is not enough to create an impermissible "multiple burden".

Petitioner must do more than simply show that the same amount of gross income has been used in the computation of the two taxes. It must also show that the state's formula of taxation places a burden on interstate commerce in a "constitutional sense". *General Motors Corporation* v. *Washington,* 377 U.S. 436 (1964). This it has not done.

The facts in the *General Motors* case are quire similar to this case. In *General Motors,* the city of St. Louis imposed a tax on the privilege of manufacturing, which was measured by the sales price prior to shipment. The State of Washington subsequently taxed General Motors for the privilege of selling goods within its borders. The Washington tax was

also measured by the gross receipts of such sales. Although it recognized that both Washington and St. Louis used the same gross receipts to measure the amount of tax due, the Court held that the taxpayer had "not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax." *General Motors, supra* at 448.

Petitioner attempts to bolster its "multiple burdens" argument by documenting the record with evidence that the identical gross receipts were used as the measure of tax in both states. This cannot, however, be considered the "demonstration of a definite multiple burden" contemplated in *General Motors.* Undoubtedly, the United States Supreme Court recognized that the same gross income was being used, without an actual evidentiary showing.

The purpose of apportionment is to limit a state's power to impose a tax on taxpayers doing business in several states to a reasonable portion of such business that is transacted within its borders. Differing taxes, due to their nature, take on differing modes of apportionment.

With regard to taxes imposed against the entire income of a taxpayer doing business in various states such as a net income tax, the commerce clause necessitates the use of apportionment formulas. As stated in *Northwestern States Portland Cement Company* v. *Minnesota,* 358 U.S. 450 (1959), "[w]hile the economic wisdom of State income taxes is one of state policy not for our decision, one of the 'realities' raised . . . is the possibility of a multiple burden resulting from the exactions in question. . . . The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce'. . . . Logically, it is impossible, when the tax is fairly apportioned, to have the same income taxed twice", *Id* at 462. This apportionment need not be precise. So long as a tax on net income is apportioned reasonably to income earned within a particular state, the apportionment will be upheld. *See, Moorman*

Manufacturing Company v. *Bair,* 437 U.S. 267 (1978) *reh.den.,* 439 U.S. 885 (1979).

Where a tax is imposed, not on income derived from a taxpayer's entire interstate business, but on an in-state activity associated with interstate commerce, an apportionment formula is usually not required. "When a general business tax levies only on the value of services performed within the state, the tax is properly apportioned and multiple burdens logically cannot occur." *Washington Department of Revenue* v. *Association of Washington Stevedoring Companies,* 435 U.S. at 746; *See, J. C. Penney Co.* v. *Hardesty,* 264 S.E.2d 604 (W. Va. 1979) (Miller J., concurring). Where a tax is imposed on in-state activities, likewise, there can be no question but that any apportionment requirement is met. *Western Maryland Railway Co.* v. *Goodwin,* 282 S.E.2d 240, 247 (W. Va. 1981) *app. dismissed,* 72 L.Ed.2d 477 (1982). The tax will necessarily be apportioned to the intrastate activities taxed. *See, Moorman Manufacturing Company* v. *Bair, supra; Standard Pressed Steel Company* v. *Washington,* 419 U.S. 560 (1975); *Virginia Foods of Bluefield, Virginia Inc.* v. *Dailey,* 289 S.E.2d 770 (W. Va. 1977). This is because no other state can tax the same in-state activities being taxed by the state in which they occur. Any such attempt to impose a tax on activities occurring in another state would clearly be a violation of the Commerce Clause of the United States Constitution. *See, Evco* v. *Jones,* 469 U.S. 91 (1972); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434 (1939); *James* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937).

Thus, it is apparent that where a tax is properly apportioned, either by virtue of formula apportionment, or due to the practical apportionment of a tax to only in-state activities, *multiple burdens cannot occur.*

The imposition of West Virginia business and occupation tax on wholesale sales in this state has been held to be properly apportioned.

> A business and occupation tax levied on substantial activities of the taxpayer within the taxing state is a

> fairly apportioned tax, because the local activities or transactions provide not only the tax nexus, but also form the boundary of the tax incident. This State's business and occupation tax is composed of a number of separate taxes on specific business activities occurring within the State. The business and occupation tax does not give rise to the problems surrounding a state income tax, where some type of apportionment standard must be built into the tax statute to segregate local income from that derived from out-of-state sources. *See, e.g., Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 98 S. Ct. 2340, 57 L.Ed.2d 197 (1978). Here, the business and occupation tax has its roots in the local transaction, and by its very nature carries its own proportionality. *J. C. Penney Co., Inc.* v. *Hardesty*, 264 S.E.2d 604, 619 (W. Va. 1979) (Miller, J., concurring).

The West Virginia Supreme Court of Appeals has addressed the situation in which a corporate net income tax is imposed in another state. In *Bishop Coal Co.* v. *Dailey*, 276 S.E.2d 220 (W. Va. 1981), the court held that the West Virginia business and occupation tax could be imposed upon the taxpayer's manufacturing activities, and that no apportionment for Virginia mining activities should be made. The court noted that:

> While the appellant argues that there is a duplication of tax because the State of Virginia levies a corporate income tax upon income attributable to Virginia operations while West Virginia taxes the entire gross receipts from the coal at the manufacturing rate, we fail to find this the type of duplicate and discriminatory taxing prohibited by *Complete Auto Transit, Inc.* v. *Brady*, (citation omitted) . . . . *Bishop*, supra at 222.

In the recent case of *Columbia Gas Transmission Corp.* v. *Hardesty*, No. AP-CA-79-89 (Cir. Ct. Kan. Co. March 2, 1981), app. den., (W. Va., March 11, 1982), *app. dismissed*, No. 81-2225 (U. S., Oct. 4, 1982), the West Virginia business and occupation tax on wholesale sales of gas was upheld against a claim of improper apportionment. In that case, the

taxpayer alleged that West Virginia's taxation of sales in this State, measured by the gross proceeds of sale, failed the apportionment test of *Complete Auto Transit, Inc.* v. *Brady, supra*, because it included the value of activities performed in other states. The taxpayer alleged that it produced natural gas form its own wells in Kentucky and imported it into West Virginia for wholesale sales. It argued that the entire value of its production, as well as a portion of the value of transportation, came from human effort and property expended by the taxpayer in Kentucky. The taxpayer therefore disputed West Virginia's claim of right to tax the entire value of the gas because the point of wholesale sale was within this State. It argued that allowing this State to incorporate value accruing in upstream states to wholesale sales in West Virginia would result in an undesirable "*cascading or pyramiding of tax*". *Id.* at 6 (emphasis added).

In disposing of this assertion, the circuit court stated:

> Despite *Complete Auto Transit's* general emphasis on economic consequences as opposed to statutory labels, that case does not require a value-added tax like that proposed by the taxpayer in lieu of an activity/gross receipts tax like the West Virginia business and occupation tax. *Complete Auto Transit* does not obliterate the distinction between the subject of a tax and its measure (base). Stated another way, the *nature* of the tax actually formulated by the state is still important and may not be ignored in favor of economic theory, especially, where, as here, that theory (the value-added tax) has been expressly rejected by the state's fiscal policy-formulators. The subject of the business and occupation tax is the privilege of conducting a particular classification of business within this state, here, the business of wholesale sales. The base portion of the measure of the tax for this classification is "gross income" defined in section 1 of the statute to include "gross receipts of the taxpayer derived from . . . sales. . . ."

* * *

> "West Virginia is not attempting to tax production or transportation activities occurring outside West Virginia. Other states do not tax the wholesale sales activity occurring exclusively in this State. Gross receipts from sales made in other states are not included in the measure of the tax in question. The value of the natural gas, as reflected in the sales price, is merely the measure of a tax imposed on the exclusively in-state wholesale sales transactions. *Id.*, at 6, 9.

Much like the instant matter, the major thrust of the taxpayer's argument in the *Columbia Gas* case was improper apportionment. The multiple burden described was the "pyramiding" of taxes. The court found no such multiple burden, however, even though West Virginia measured its tax on the privilege of selling at wholesale, by the gross proceeds of sale, because the subject of the tax, wholesale sales, occurred entirely within this state. The court distinguished the subject of the tax from its measure, and noted that West Virginia was not taxing a subject or activity occurring outside its borders.

In the present matter, Kentucky imposes a tax on the severance of coal. Ky. Rev. Stat. §143.020. This tax is measured by gross income less transportation and processing expenses. The nature of the tax is to tax the actual severance as it occurs in the mine. *Clay County* v. *Leslie County,* 531 S.W. 524 (Ky. App. 1975).

West Virginia, on the other hand, imposes a tax upon sales into this State under W. Va. Code §11-13-2c. The West Virginia business and occupation tax is a tax on the privilege of doing business in this State. *See, Virginia Foods of Bluefield Virginia, Inc.* v. *Dailey, supra.* This tax is precisely apportioned to the in-state activities taxed. *Id.*

In this instance, there are two jurisdictions imposing perfectly apportioned taxes upon two entirely different privileges, or tax subjects, each using gross receipts to measure the tax imposed.

Petitioner contends that the distinction between the activity or subject being taxed and the measure of the tax is nothing more than a semantic distinction, which ignores economic realities. It is the Petitioner's position, however, that belies economic realities. If, for example, Kentucky had chosen to impose a tax of a certain amount per ton, petitioner's allegations of unfair apportionment would have no foundation.

The imposition of the West Virginia business and occupation tax on wholesale sales made into this state has consistently been held to be a properly apportioned tax. *J. C. Penney Co.* v. *Hardesty, supra; Virginia Foods of Bluefield Virginia, Inc.* v. *Dailey, supra.*

The existence of a Kentucky severance tax which utilizes a portion of gross receipts as a measure of the tax, therefore, does not impose a multiple burden in a "constitutional sense," which invalidates the imposition of the West Virginia tax on wholesale sales within this State.

The second issue is whether the tax imposed is reasonably related to the services provided by the taxing state.

Petitioner contends that since its physical presence in this State is confined to the presence of its West Virginia production operation, the benefits made available by West Virginia cannot be said to extend to sales of Kentucky mined coal.

Petitioner attempts to compartmentalize its overall business and to isolate its sale of Kentucky mined coal from its other West Virginia sales and activities.

As stated in *J. C. Penney Co., Inc.* v. *Hardesty, supra* at 617:

> "The taxpayer cannot escape taxation by attempting to isolate his local activities into compartments and by contending that each compartment must be viewed separately without regard to the taxpayer's entire activities in the State. In both *General Motors* and *Standard Pressed Steel,* the taxpayer's in-state activities were thought to be sufficient even though these activities did

not have a substantial direct relationship to the activity taxed."

More recently, the West Virginia Supreme Court of Appeals addressed the question of rational relationship in *Armco Inc.* v. *Hardesty*, 303 S.E.2d 706, 714 (W. Va. 1983), stating:

> "The question of proportionality is also viewed from the prospective of services and benefits rendered by the State to all activities of taxpayer occurring within the State. . . ."

Armco was extensively engaged in mining and selling coal in West Virginia through its Mining Division. It also operated other out-of-state manufacturing divisions, which sold its products to West Virginia concerns with a minimal amount of instate activities performed by its representatives. Armco contended that each of its separate divisions must be treated individually. Thus, it argued that there was no rational relationship between the amount of tax imposed on each division, and the protections, opportunities, and benefits each division received from the state.

The Court easily dismissed Armco's contention, stating, "certainly, when Armco's total business activity is viewed in this Sate, it enjoys numerous benefits and protections by the State, including fire and police protection and a host of social legislation." *Armco, supra* at 716.

In view of Petitioner's substantial coal mining activities within this State, its contention also must fail. Moreover, Petitioner's sales of Kentucky coal into West Virginia are not totally unrelated to its coal mining operations in West Virginia.

For the most part, Petitioner has but one major customer in West Virginia, Weirton Steel Company. In order to fulfill the needs of that customer, Petitioner mines and sells coal from its three locations in West Virginia, Kentucky, and Pennsylvania. Petitioner's coal mining operation in West Virginia is an integral part of its overall business of selling

substantial amounts of coal to a single West Virginia customer.

The overall protections, benefits and opportunities afforded by this State to Petitioner are clearly sufficient to sustain a tax upon its sales made into West Virginia measured by the gross receipts of such West Virginia sales.

Petitioner also summarily alleged that the imposition of the subject tax was discriminatory in nature. Petitioner did not, however, provide any basis or argument as to how the tax discriminated against interstate commerce and none can be found. In addressing the question of discrimination in *Columbia Gas Transmission Corp.* v. *Hardesty, supra* at 13, the Court stated "there is no constitutional infirmity with the *measure* of a tax containing extraterritorial values as long as the *subject* of the tax is within the exclusive jurisdiction of the taxing authority. . . ."

Finally, it is determined, due to the complexity of the evolving law surrounding the taxation interstate commerce, that Petitioner's failure to report its income derived from interstate sales commerce was due to reasonable cause and not wilful neglect. Therefore, all penalties should be waived.

WHEREFORE it is the DECISION of Herschel H. Rose III, Tax Commissioner of the State of West Virginia, that the business and occupation tax assessment issued against National Mines Corporation for the period January 1, 1975 through December 31, 1979 for tax of $475,345.02 and interest of $16,017.71, should be and is hereby affirmed as issued with penalty thereon waived in full for a total liability of $491,362.73. Interest continues to accrue on unpaid liabilities for periods ending on or after July 1, 1978 until such liabilities are paid.

/s/ Herschel H. Rose III
HERSCHEL H. ROSE III
STATE TAX COMMISSIONER

April 16, 1984
Date Rendered

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NATIONAL MINES CORPORATION,
a corporation,

Appellant,

v.

MICHAEL E. CARYL,
as Tax Commissioner of the
State of West Virginia,

Appellee.

Civil Action No. 84-C-AP-165

FINAL ORDER

This action involves an appeal by the taxpayer, National Mines Corporation, from a decision of the state tax commissioner pursuant to W. Va. Code §11-10-10.

National Mines is a corporation primarily engaged in the business of producing and selling coal. The petitioner operates mines in Kentucky, Pennsylvania and West Virginia. The issue with which the Court is presented involves a coal which is mined in Kentucky and Pennsylvania and sold in West Virginia. National Mines is taxed by West Virginia on its activity of selling coal at whole sale within the State.

National Mines pays coal a severance tax to the Commonwealth of Kentucky. The severance tax is measured by the gross receipts of the coal, less certain adjustments. Adjustments include coal processing costs, transportation costs and brokered coal.

National Mines was assessed for business and occupation tax on its sale of coal in West Virginia. National Mines appealed, and the tax commissioner held that National Mines is liable for the tax assessed on its sales of coal in West Virginia. National Mines appealed the tax commissioner's decision to this Court.

In *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.E.2d 540 (1984), the United States Supreme Court

determined that the West Virginia business and occupation tax violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as applied to taxpayers manufacturing products outside West Virginia and selling them at wholesale in West Virginia. The tax was unconstitutional as applied to such taxpayers because West Virginia manufacturers, who paid a tax on their manufacturing activity, were exempt from the tax on their wholesale sales activity.

National Mines does not fall precisely within the holding of *Armco*. It produces natural resources (as opposed to manufacturing products) outside West Virginia and sells them in West Virginia. Under the statutory scheme, it is subject to the business and occupation tax on its wholesale sales activity. West Virginia producers are subject to tax on their production activity, but are exempt from tax on their wholesalesales activity. This statutory scheme parallels the scheme ruled upon in *Armco*. There can be little doubt that the statutory scheme applied to National Mines violates the Commerce Clause in the same manner as did the statutory scheme in *Armco*.

In recent cases where the United States Supreme Court has ruled that state tax statutes violate the Commerce Clause, it has declined to address the issue of what constitutes an appropriate remedy in the first instance. Because federal constitutional issues may be intertwined with or obviated by state law, state courts should first address the issue of refund claims. *National Can Corp.* v. *Washington Dept. of Revenue*, 483 U.S. , 107 S.Ct. , 97 L.Ed.2d 199 (1987); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

In *Ashland Oil, Inc.* v. *Rose*, 350 S.E.2d 531 (W.Va. 1986), the West Virginia Supreme Court has addressed the issue of the appropriate remedy in a situation involving a taxpayer like Armco. It determined that the *Armco* decision was to be applied prospectively. The *Ashland* decision applied to both taxpayers who paid the tax and filed claims for refund and taxpayers who had been assessed the tax and appealed their assessments. The tax commissioner relies on the decision in

Ashland in his attempt to enforce the assessment against National Mines.

Because the *Ashland* decision allows the tax commissioner to assess and collect tax under a statutory scheme that is unconstitutional, National Mines argues that the holding violates the Supremacy Clause, U.S. Const. art. VI, cl. 2. This Court recognizes that it is unfair to allow tax to be collected under a taxing scheme that is so clearly unconstitutional. However, the Court is required to follow the decision of the West Virginia Supreme Court unless and until the West Virginia Supreme Court overrules itself, or its decision is overturned by the United States Supreme Court.

National Mines also asserts that the West Virginia tax fails to meet the second prong of the test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). This second prong of the *Complete Auto* test requires that a state tax on interstate commerce be fairly apportioned.

National Mines argues that gross receipts from sales of coal produced in Kentucky has been subjected to double taxation. Kentucky imposes a severance tax which is measured by the gross receipts of from the sale of the coal. West Virginia imposes a tax on National Mines' sales activity which is also measured by the gross receipts of from the sale of the coal.

Unapportioned gross receipts from the activity of selling within the state may be subject to tax by the state of sale so long as the remainder of the *Complete Auto* test is satisfied. See, e.g. *Tyler Pipe Industries* v. *Washington*, 483 U.S. , 107 S.Ct. , 97 L.Ed.2d 199 (June 23, 1987). This is permissible, even though the value of the transaction is partly attributable to a separate activity occurring outside the State. See *Tyler Pipe*, supra; *Armco, Inc.* v. *Hardesty*, 303 S.E.2d 706 (W.Va. 1983), rev'd on other grounds, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984). West Virginia may tax the unapportioned gross receipts of the sale of natural resource products sold in West Virginia, so long as the tax is measured by the selling price. This is so, even though the gross receipts may include value added by the

Kentucky production or severance activity. The tax is valid in this respect.

National Mines also contends that the tax is unconstitutional because it is not fairly related to the services provided by the State. The Court disagrees with the taxpayer's argument. It enjoys the benefits of a civilized society in which to market its products and it has recourse to the State courts to protect its interests within the State. The State has given the taxpayer something for which may ask a return. This is all that is required under the fourth prong of the *Complete Auto* test. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884, 899 (1981); *Western Md.Ry.Co.* v. *Goodwin*, 282 S.E.2d 240 (1981).

In accordance with the above, it is hereby ORDERED and ADJUDGED that the decision of the State Tax Commissioner is affirmed.

The Court does hereby FURTHER ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. The Court notes the objection and exception of the party or parties aggrieved by this Order.

Date: May 2, 1988 ENTER:

/s/ Herman Canady
JUDGE

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 31st day of May, 1989, the following order was made and entered:

NATIONAL MINES CORPORATION,
a corporation,

Plaintiff Below, Petitioner

vs.

MICHAEL E. CARYL, as Tax Commissioner
of the State of West Virginia,

Defendant Below, Respondent

On a former day, to-wit, January 30, 1989, came the petitioner, National Mines Corporation, a corporation, by Robinson & McElwee, E. Glenn Robinson, and David K. Higgins, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 6th day of May, 1988, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Justices Neely and Workman absent.

A True Copy Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of
Appeals

No. 89-337

In The

Supreme Court of the United States

October Term, 1989

NATIONAL MINES CORPORATION,

Petitioner,

v.

MICHAEL E. CARYL, as Tax Commissioner of the State of West Virginia,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Shall this Court compel retroactive application of its holding in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984)?

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No. 89-337

In The

Supreme Court of the United States

October Term, 1989

NATIONAL MINES CORPORATION,

Petitioner,

v.

MICHAEL E. CARYL, as Tax Commissioner of the State of West Virginia,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION TO THE PETITION

JURISDICTIONAL STATEMENT

National Mines Corporation seeks a writ of certiorari to the Supreme Court of Appeals of West Virginia as the result of an order entered May 31, 1989, by the Supreme Court of Appeals of West Virginia denying National Mines Corporation's petition for appeal from an order entered by the Circuit Court of Kanawha County, West Virginia, on May 2, 1988. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257, stating that

petitioner "asserts the right to be free of impermissible burdens on interstate commerce, which right is conferred by the Commerce Clause, and its right to be free from enforcement of a tax sought to be collected under an admittedly unconstitutional statute, which right is conferred by the Supremacy Clause." Petitioner's Jurisdictional Statement, page 1. However, here there is no constitutional challenge.

The circuit court below agreed with the petitioner that the taxing scheme at issue was unconstitutional as a violation of the Commerce Clause and that it was invalidated by *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *rehearing denied*, 469 U.S. 912 (1984). The circuit court declined to grant the petitioner the relief sought because it was bound to apply *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 481 U.S. 1025 (1987) (dismissed for want of a final decision), which applied *Armco* prospectively only. The only issue presented to this Court is whether prospective application of *Armco* is proper. As such, petitioner's assertion of jurisdiction is invalid.

This Court has repeatedly recognized that questions of retroactivity are not constitutional in nature. *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932); *United States v. Johnson*, 457 U.S. 537 (1982). For purposes of this petition, no issue remains where a state statute has been "drawn in question." The lower court did not uphold a state statute in the face of a constitutional challenge, and, accordingly, this petition should be denied because the petition is not within the jurisdiction of 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner is a corporation principally engaged in the production and sale of coal. Its corporate headquarters are located in Lexington, Kentucky. Petitioner operates mines located in Pennsylvania, Kentucky and West Virginia.

During the audit period, petitioner engaged in substantial mining in West Virginia and paid a total of $3,337,522.00 in business and occupation tax with respect to its mining operation in West Virginia.

Petitioner operated one deep mine in West Virginia which employed approximately 350 to 400 persons. Additionally, petitioner had 12 to 18 contract miners working on approximately eighteen to nineteen thousand acres in West Virginia.

Petitioner also sells a substantial amount of coal which it mines at out-of-state locations to West Virginia customers. The vast majority of its sales into West Virginia were sold under contract to Weirton Steel Company.

The audit findings included unreported income attributable to (1) engineering fees, (2) federal reclamation fees, (3) production of coal from contract miners and (4) wholesale sales of coal produced in Pennsylvania and Kentucky and sold to West Virginia customers.

Petitioner has conceded the taxability of gross income of all the above items except West Virginia's wholesale sale of coal produced in Kentucky.

With respect to its mining operation in Kentucky, petitioner pays the Commonwealth of Kentucky a corporate net income tax, a property tax, and a coal severance

tax. The coal severance tax is measured by the gross receipts from the sales of the coal less certain adjustments. KY. REV. STAT. § 143.020 (1978). The adjustments are for (1) coal processing costs, (2) transportation costs, and (3) brokered coal. During the audit period, the coal severance tax rate was four percent prior to July 1, 1976. and four and one-half percent thereafter.

For each year of the audit period, January 1, 1975 through December 31, 1979, petitioner has paid the Kentucky coal severance tax on coal which petitioner ultimately sold to West Virginia customers.

REASONS FOR DENYING THE WRIT

I.

THE SUPREMACY CLAUSE IS NOT A TOOL TO AVOID THE PROPER DECISION OF A STATE COURT ON THE QUESTION OF THE PROSPECTIVITY OR RETROACTIVITY OF RELIEF TO BE GRANTED TO AGGRIEVED TAXPAYERS AFTER A STATE TAX STATUTE HAS BEEN FOUND TO BE UNCONSTITUTIONAL.

The petitioner attempts to use the Supremacy Clause of the United States Constitution, Article VI, Clause 2, to do what it could not do in the courts below: avoid the decision of the Supreme Court of Appeals of West Virginia in the case of *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 481 U.S. 1025 (1987) (dismissed for want of a final decision). *Ashland* denied retroactive application of this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *rehearing denied*, 469 U.S. 912

(1984), which invalidated the West Virginia business and occupation tax on wholesale sales by out-of-state manufacturers. The petitioner argues that the Supremacy Clause operated to provide a retroactive effect to the *Armco* decision because the Supremacy Clause invalidates state law that is contrary to federal law. This contention must be rejected for two reasons. First, the petitioner is simply wrong, for its argument ignores the substantial development of law by this Court on the question of the effect of its decisions which invalidate prior law on constitutional grounds. Second, if this Court accepts the argument of the petitioner which seeks to apply the Supremacy Clause to the case, it will open a path backwards to the past that has the potential to frustrate the ability of this Court, or any other court, to redress future constitutional infirmities.

There is but one question presented to this Court by the instant petition. That question is, "Shall this Court compel retroactive application of its holding in *Armco*?" All of the petitioner's arguments, both on Supremacy Clause and Commerce Clause grounds, are but shadows cast by this central question.

The respondent acknowledges that this Court's ruling in *Armco* applies to the petitioner in this case. As noted by the circuit court below, although the petitioner does not fall precisely within the holding of *Armco*, the statute, as applied to the petitioner, violates the Commerce Clause of the United States Constitution, Article I, § 8, Clause 3, in the same manner. This point being conceded by respondents, it must follow what relief that petitioner may be afforded. The respondent asserts that the circuit court properly applied *Ashland Oil, Inc. v. Rose*,

350 S.E.2d 531 (W. Va. 1986), *appeal dismissed* 481 U.S. 1025 (1987), and that *Ashland Oil* is controlling upon the petitioner.

In *Ashland Oil* the Supreme Court of Appeals of West Virginia was directly confronted with the question of the retroactive or prospective application of *Armco*. The court applied its criteria for prospective application of judicial decisions in civil cases which is found in Syllabus Point 5 of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). The syllabus point states:

> "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions."

The West Virginia Supreme Court applied the *Bradley* factors, finding that the substantive issue of *Armco* was a traditionally settled area of law, state taxation; that it involved an unexpected departure from prior law without foreshadowing of the change; that the *Armco* decision overruled a statute that had been in existence since 1935, and not a common-law decision, thus, producing a wider impact with more severe hardships resulting; that the *Armco* case was a constitutional interpretation departing from prior precedent; and that previous law required payment of the wholesale tax. The court concluded that, based on these factors, it would apply the principles enunciated in *Armco* prospectively from the date of this Court's decision in that case.

As the Supreme Court of Appeals of West Virginia noted in *Ashland*, 350 S.E.2d at 534, note 6, the *Bradley* "criteria follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), and later cases." In *Chevron*, this Court set forth its standards governing prospective application of judicial decisions in civil cases as follows:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, * * * 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this

> Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [citations omitted.] *Chevron*, 404 U.S. at 106-107.

Thus, the test employed by the West Virginia Supreme Court of Appeals varied little from the test this Court itself would apply.

This Court has previously noted that tax refund issues, or issues involving the appropriate remedy for the imposition of an unconstitutional tax, are "frequently intertwined with, or their consideration obviated by, issues of state law" and may be better resolved at the state level. *Baccus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984). *Accord, Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987); *Davis v. Michigan Dept. of Treasury*, 489 U.S. ___, 109 S. Ct. 1500 (1989). Therefore, we should look first to the laws of the state whose statute has been invalidated.

West Virginia's law has acknowledged as a general rule the position that an unconstitutional law is inoperative as if it were never passed. *Comm. on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988) citing *Ex parte Siebold*, 100 U.S. 371 (1879); *Norton v. Shelby County*, 118 U.S. 425 (1886). However, both this Court and the West Virginia Supreme Court have also long recognized that the absolute rule of *Ex parte Siebold* and *Norton* may be modified. In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), Chief Justice Hughes addressed the *Norton* position when he wrote

that "such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications." 308 U.S. at 374. "The actual existence of a statute," he noted, "is an operative fact and may have consequences which cannot justly be ignored." *Id.* at 374. *See, Cipriano v. Houma*, 395 U.S. 701 (1969) (prospective application of ruling that a state statute concerning municipal bond issues was unconstitutional so as to avoid significant hardships). The West Virginia courts have adopted a similar analysis, beginning with *Morton v. Cabot*, 134 W. Va. 55, 63 S.E.2d 861 (1949). *See, City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983); *Williamson v. Gane*, 345 S.E.2d 318 (W. Va. 1986). Thus, under both federal and West Virginia law, the general rule of retroactivity is tempered by a pragmatic approach which allows exception to the rule where the tests of *Chevron* and *Bradley*, respectively, may be applied.

It was Justice Cardozo, in *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932), who cleared the way for state courts to make their own retroactivity decisions, either "forward operation" or "relation back." *Id.* at 364. In writing for the majority, he held that there was no protected federal constitutional right involved when a state, in that instance, Montana, applied its non-retroactive doctrine of *stare decisis* and left the question for the Montana courts to decide.

It is axiomatic that the United States Constitution is the "superior, paramount law" of the land, *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), and that the Constitution binds all courts. *Cooper v. Aaron*, 358 U.S. 1 (1958). The *Ashland* decision, as well as that of the circuit

court herein which followed *Ashland*, obeys these fundamental tenets. The *Ashland* decision obeys the *Armco* holding – it simply applies West Virginia law to determine whether to retroactively invalidate the offending statute or to apply the *Armco* rule prospectively only.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, will not, thus, serve as a tool on behalf of the petitioner to compel a retroactive invalidation of the offending statute. The United States Constitution has no voice on the subject of prospective or retroactive application. *United States v. Johnson*, 457 U.S. 537, 542 (1982). *See also, Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) (denying a United States Constitutional due process attack on the prospective application of the Montana Supreme Court); *Linkletter v. Walker*, 381 U.S. 618 (1965) (refusal to apply *Mapp v. Ohio*, 367 U.S. 643 (1961) retroactively). As respondent has previously shown, the *Ashland* decision upon which the circuit rested the order in petitioner's case is well within the scope of this Court's *Chevron* test and should be respected.

The final failing in the petitioner's Supremacy Clause argument is that the argument ignores the draconian impact of the logical extension of its stance. Thus, petitioner's position, the respondent believes, may be summarized as: if a statute is unconstitutional, then by operation of the Supremacy Clause, it must be considered to have never existed; if a statute is considered to have never existed, it may not be enforced. It is an absolutist view with its feet soundly in the language of *Norton v. Shelby County*, 118 U.S. 425 (1886). As has been previously

noted, Chief Justice Hughes spoke to this view of the law in *Chicot Co.*, when, referring directly to *Norton*, he said:

> "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, – with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, *and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.*" (Emphasis added.) *Chicot Co.*, 308 U.S. at 374.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court freed itself from the Blackstonian view that a court was not to "pronounce new law, but to maintain and expound the old one." *Linkletter v. Walker*, 381 U.S. at 622-623 [quoting 1 Blackstone, Commentaries 69 (15th ed 1809)]. In an extensive analysis authored by Justice Clark, this Court made an exhaustive review of the development of the theories of the retroactivity of judicial decisions. This Court concluded its opinion saying:

> "All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application." *Linkletter v. Walker*, 381 U.S. 639-640.

Thus, this Court was set free to rule on the present and future without apprehension about the past. Beytagh, *Ten Years of Non-Retroactivity; A Critique and A Proposal*, 61 Va. L. Rev. 1557, 1562-1563 (1975). To use the Supremacy Clause as petitioner would have this Court apply it, would sweep this Court back to Blackstone, where every decision of this Court adopting a new constitutional interpretation would set off a chain reaction into the past.

II.

WEST VIRGINIA'S ASSESSMENT IMPOSES NO MULTIPLE BURDEN OF TAXATION ON THE PETITIONER.

The Commerce Clause of the United States Constitution, Article I, § 8, Clause 3, provides, in pertinent part, that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states." This power is limited by the requirements announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), wherein this Court held that interstate commerce may be required to pay its fair share of state taxes.

State taxation will be upheld when the tax is applied to an activity with a substantial nexus to the tax state, is fairly apportioned, is fairly related to services provided

by the state and does not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady, id.*

The petitioner herein claims that the West Virginia business and occupation tax on wholesale sales, when added to Kentucky's severance tax, constitutes a violation of the Commerce Clause in that it would impermissibly subject the petitioner to multiple tax burdens. Petitioner argues that since West Virginia and Kentucky tax the same gross receipts, a legitimate multiple-burdens claim results. This would, at first glance, be persuasive if the petitioner's argument were not fundamentally and fatally flawed. Neither West Virginia's nor Kentucky's taxes which are challenged herein are taxes on gross receipts. In both statutes, W. Va. Code 11-13-2c (1983) and KY. REV. STAT. § 143.020 (1978), it is an *activity* that is being taxed and not gross receipts. Indeed, Kentucky's severance tax provides for a minimum tax calculated not on the gross value of the coal severed, but on a fixed rate per ton severed. Should the price of Kentucky's coal fall sufficiently low, the measure of the Kentucky severance tax would cease to be gross value. What then happens to petitioner's argument that West Virginia's tax constitutes an unconstitutional multiple burden of taxation on petitioner because petitioner must pay taxes on the same gross receipts by two or more states? It collapses. The taxes involved here are taxes on activities, not on gross receipts. Gross receipts are simply the mechanism by which each tax may be calculated.

There is no question of improper apportionment here. A tax is presumed to be self-apportioning when the activity taxed occurs wholly within the state where the tax is imposed. *Standard Pressed Steel Co. v. Washington,*

419 U.S. 560 (1975); *Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987). There is utterly no evidence that the activity taxed by West Virginia, wholesale sales, did not occur wholly within the State of West Virginia. The tax on the wholesaling activities of petitioner is, therefore, properly apportioned.

The petitioner complains that the lower court misinterpreted this Court's opinion in *Tyler Pipe*, with respect to the issue of apportionment. Respondent submits that this court spoke directly to this issue when it said:

> "Tyler also asserts that the B & O tax does not fairly apportion the tax burden between its activities in Washington and its activities in other States. See Complete Auto Transit, Inc. v. Brady, 430 US 274, 285, 51 L Ed 2d 326, 97 S Ct 1076 (1977). Washington taxes the full value of receipts from in-state wholesaling or manufacturing; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events invalidating the multiple activities exemption. Thus, the activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See Moorman Mfg. Co. v. Bair, 437 US, at 280-281, 57 L Ed 2d 197, 98 S Ct 2340 (gross receipts tax on sales to customers within state would be 'plainly valid'); Standard Pressed Steel Co. v. Washington Revenue Dept, 419 US, at 564, 42 L Ed 2d 719, 95 S Ct 706 (selling tax measured by gross proceeds of sales is 'apportioned exactly to the activities taxed')." *Tyler Pipe*, 483 U.S. at 251.

Petitioner can point to no substantive difference between its position and the position of the out-of-state manufacturer described in the above-quoted language. Since, under both *Armco* and *Tyler Pipe*, the petitioner's severance activity and wholesaling activity could not be regarded as substantially equivalent events, it follows that the activity of wholesaling taxed here by West Virginia is a separate activity that no other state has jurisdiction to tax. Ironically, beyond the petitioner's erroneous reliance on the semantics of "gross receipts," it was petitioner's success at demonstrating an *Armco* Commerce Clause violation that seals the defeat of his multiple burdens claims. This ground is simply an attempt by petitioner to avoid the effect of *Ashland Oil* by striving to distinguish itself from the *Armco/Tyler Pipe/Ashland Oil* line of cases.

III.

WEST VIRGINIA'S ASSESSMENT IS REASONABLY RELATED TO THE BENEFITS CONFERRED BY THE STATE.

The circuit court correctly determined that the West Virginia business and occupation tax assessed was reasonably related to benefits conferred upon the petitioner. The tax assessed is directly related to the benefits

afforded the petitioner. The more a taxpayer affords itself of the opportunities available in West Virginia, the more tax it pays; *i.e.*, the more wholesale activities it conducts, the more its gross receipts will be and the more tax it will pay.

This Court has recently restated that "a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfies the requirement that the tax be fairly related to benefits provided by the state to the taxpayer." *D. H. Holmes Co. Ltd. v. McNamara*, 468 U.S. 24, ___, 108 S. Ct. 1619, 1624 (1988). West Virginia has given the petitioner something for which it may ask a return. The tax assessed meets the fourth prong of the *Complete Auto* test, and does not violate the Commerce Clause.

CONCLUSION

The respondent respectfully submits that, for the foregoing reasons, jurisdiction does not lie here under 28 U.S.C. § 1257 and that the orders of the West Virginia courts are, in all respects, manifestly correct, and the relief to which the respondent is entitled is that the

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

NATIONAL MINES CORPORATION *v.* MICHAEL E. CARYL, TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 89-337. Decided June 28, 1990

PER CURIAM.

Petitioner National Mines Corp. (National) is principally engaged in the business of producing and selling coal. Among its other activities, National mines coal in Kentucky and Pennsylvania and sells it wholesale in West Virginia. During the period relevant here, West Virginia imposed a gross receipts tax on wholesale sales of tangible property. W. Va. Code § 11-13-2c (1983). Local producers were subject to taxes on their production activities, but exempt from the tax on wholesale activities. § 11-13-2.

On December 22, 1980, the State Tax Department of West Virginia assessed $475,345.02 in business and occupation tax (plus interest and penalties) for the period January 1, 1975, through December 31, 1979, on National's wholesale sales of coal in West Virginia. National filed a petition for reassessment, asserting that the tax violated the Due Process and the Commerce Clauses of the Federal Constitution. The State Tax Commissioner upheld the assessment, concluding that the tax was fairly apportioned, that the measure of the tax was reasonably related to the benefits conferred by the State, and that the tax did not discriminate against interstate commerce.

A few days before National appealed to the State Circuit Court, this Court issued its opinion in *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), which held that the West Virginia business and occupation tax sought to be collected from petitioner was unconstitutional. National's action was

held in abeyance while the West Virginia Supreme Court of Appeals considered a similar challenge to the state tax in light of *Armco*. See *Ashland Oil, Inc.* v. *Rose*, 350 S. E. 2d 531 (1986). After analyzing the retroactivity of *Armco* under a state law test that it considered to "follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971)," 350 S. E. 2d, at 534, n. 6, the court concluded that *Armco* applied prospectively only. The State Supreme Court thus permitted the State to collect the gross receipts taxes due for fiscal years prior to the date of decision in *Armco*. 350 S. E. 2d, at 536–537.

The State Circuit Court in this case followed *Ashland Oil* to uphold the State's collection of the assessed taxes. The West Virginia Supreme Court of Appeals refused to consider National's petition for appeal.

In its petition for certiorari to this Court, National contends, among other claims, that the state court erred in following *Ashland Oil*'s nonretroactivity decision and allowing the State to enforce an unconstitutional tax statute. We agree. For the reasons stated today in *Ashland Oil, Inc.* v. *Rose*, *ante*, p. ——, we hold that *Armco* applies retroactively under the reasoning of either the plurality or the dissent in *American Trucking Assns.* v. *Smith*, 495 U. S. —— (1990). Because the State Circuit Court failed to consider the constitutionality of the taxes assessed against National in light of our decision in *Armco*, we grant the petition for certiorari, reverse the judgment of the State Circuit Court, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.